L & M Ambulance Corporation *and* Greater Hartford Emergency Medical Technicians Association. Case 34–CA–5963

November 4, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issue in this case is whether the judge correctly found that the Respondent violated Section 8(a)(5), (3), and (1) of the Act when, pending certification of the Union after a Board-conducted election, it did not follow its usual practice of granting pay increases in October of each year.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, L & M Ambulance Corporation, West Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Make whole the employees in the appropriate unit for any monetary losses they have suffered by reason of the Respondent's unilateral withholding of annual wage increases which the employees would have received by paying them the differences between their actual wages and wages they would have otherwise received, with interest.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT make unlawful unilateral changes in our employees' wages without first bargaining collectively with Greater Hartford Emergency Medical Technicians Association (the Union) for our employees in the following appropriate unit:

> All full-time and regular part-time emergency medical technicians, including EMT-A's, EMT-Intermediates, EMT-Paramedics, and all complaint writers and dispatchers employed by the Respondent at or out of its facility; but excluding all other employees, all casual employees, all office clerical employees, all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT deny a regular wage increase to our employees in the above-described unit because of their support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL make whole the employees in the above appropriate unit for any monetary losses they may have suffered by reason of our unilateral withholding of the annual wage increases they would have received by paying them the difference between their actual wages and the wages they would have otherwise received, with interest.

WE WILL bargain with the Union about this as well as future wage increases for these employees.

L & M AMBULANCE CORPORATION

Thomas E. Quigley, Esq., for the General Counsel.
Morton W. Appleton, Esq. (Appleton & Appleton), for the Respondent.
David M. Fackelmann, for the Charging Party.

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[1] On July 6, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

In adopting the judge's finding that the General Counsel established that the Respondent had a past practice of granting employees yearly wage increases in October, we rely solely on the uncontradicted evidence that employees received wage increases in October 1990 and October 1991 as well as the Respondent's acknowledgment of that practice in its August 24, 1992 memorandum to employees and its November 5, 1992 letter to the Union.

[3] In light of the undisputed record evidence that the amount of the Respondent's October 1992 wage increases would have varied from 4 percent to 7 percent depending on the evaluations of the employees, we disagree with the judge's recommended Order that the Respondent give an across-the-board 7-percent wage increase to employees. Rather, we will order, as we traditionally do in such cases, that the Respondent make the employees whole for the wage increases they would have received in October 1992 by payment to them of the differences between their actual wages and the wages they would otherwise have received. *Daily News of Los Angeles*, 304 NLRB 511 (1991), remanded 979 F.2d 1571 (D.C. Cir. 1992); *Allied Products Corp.*, 218 NLRB 1246 (1975).

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 24, 1993, in Hartford, Connecticut. The complaint herein, which issued on February 9, 1993, and was based upon an unfair labor practice charge filed on December 29, 1992,[1] by Greater Hartford Emergency Medical Technicians Association (the Union), alleges that L & M Ambulance Corporation (Respondent) violated Section 8(a)(1), (3), and (5) of the Act by failing to grant a wage increase to certain of its employees on about October 1.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with its principal office and place of business located in West Hartford, Connecticut (the facility), has been engaged in the business of providing ambulance services. During the 12-month period ending January 31, 1993, Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Connecticut. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Professional Ambulance Service, Inc. (Professional) has been in the ambulance business in the Hartford, Connecticut area since, at least, the early 1980s. It is owned by Harvey Kagan and Morton Appleton. Its employees are represented by the Union; the most recent collective-bargaining agreement covering these Professional employees covers the period 1991 through 1994. In the spring of 1988, Kagan and Appleton purchased the Respondent whose employees were not represented by any union. Respondent and Professional have since been found to constitute a single employer, although they have continued to operate as separate units, one, Professional, unionized, and the other, Respondent, with about 80 unit employees, and no recognized union. This changed in August when, at a Board-conducted election, the tally of ballots established that 43 votes were cast for the Union and 15 were cast against the Union. The Respondent's objections to this election were overruled and the Union was certified on February 2, 1993, in the following appropriate unit:

> All full-time and regular part-time emergency medical technicians, including EMT-As, EMT-Intermediates, EMT-Paramedics, and all complaint writers and dispatchers employed by the Employer at or out of its West Hartford, Connecticut facility; but excluding all other employees, all casual employees, all office clerical employees, and all guards, professional employees, and supervisors as defined in the Act.

Professional has had some prior experience in Board proceedings. In August 1988, Administrative Law Judge Julius Cohn issued a decision wherein he found that Professional violated Section 8(a)(1), (3), and (4) of the Act by discharging an employee because of his union activities and for having given testimony under the Act. These findings were not appealed and were adopted by the Board. On June 4, 1990, Administrative Law Judge Raymond Green issued a decision in which he found that Professional violated Section 8(a)(1) and (3) of the Act by discharging three employees and by refusing to transfer an employee during this same period. Other violations were also found, including threats of the loss of overtime because of employee's union activities and Weingarten violations. No exceptions were filed to this decision and it was enforced by the Court of Appeals for the Second Circuit, also without exceptions.

David Fackelmann, president of the Union and an employee of Professional since 1986, testified that shortly after the Board-conducted election in August, he asked Nirmal Singh, vice president of Respondent and Professional, to bargain with the Union since they won the election. Singh refused, saying that Respondent would be filing objections to the election. By letter to Singh dated January 8, 1993, Fackelmann repeated this request. Respondent and the Union commenced bargaining after the Board's certification issued in February 1993; no contract had been agreed to at the time of the hearing.

The allegation is that there had been a practice at Respondent prior to 1992 for the employees to be given yearly wage increases in about October. Admittedly, Respondent granted no wage increases to its unit employees at that time in 1992; it is alleged that the omission of these wage increases violated Section 8(a)(1), (3), and (5) of the Act.

Fackelmann testified that although he works for Professional, because he ''worked literally side by side'' with Respondent's employees, he was aware of Respondent's wage increase policy: ''The practice is they're granted annual wage increases specifically in the Fall, more specifically . . . usually in October every year.'' However, he had no direct knowledge of the amount of the wage increase given to the employees. Received in evidence was a memorandum dated August 24, 1990, from Kagan to Respondent's employees regarding their benefits. As regards wage increases, the memorandum states:

> Within the next 30 days, all L & M employees will be evaluated for proficiency and effective October 1, 1990 a wage increase of 4% cost of living plus up to a 3% additional increase may be given depending on your evaluation.

Fackelmann testified further that on about October 28 he went to Singh's office and asked him what he was going to do about the October wage increase for Respondent's employees. Singh told him to get out of the office as he was not supposed to be there. Singh also said that the certification was in the Board's hands and he couldn't do anything until it was settled by the Board. By letter to Singh dated October 13, Fackelmann wrote:

[1] Unless indicated otherwise, all dates referred to relate to the year 1992.

> 1. Any day now, the National Labor Relations Board will put an end to your petty, contrived allegations of an unfair election of union representation.
>
> 2. As you know, unilateral changes in working conditions are prohibited pending certification.
>
> 3. L&M employees have historically enjoyed annual raises in October, as a term and condition of employment.
>
> 4. You have ten days to announce and implement annual raise for L&M employees. GHEMTA shall pursue this issue as retaliatory and retribution for electing union representation using all resources.

By letter to Fackelmann dated November 5, Singh wrote, inter alia:

> Coming now to the question of L&M raises. Yes, L&M employees have been receiving merit raises in varying amounts based on evaluation of their performance by Management, generally around fall. If GHEMTA had not committed all those serious irregularities in the August 14, 1992 election, the issue would have been clearly decided long back. With the outcome of the L&M election up in the air, if we had announced and implemented the raises on our own, GHEMTA would surely have filed charges alleging improper influencing or refusal to bargain. Since we did not, you are up with your bravado, rough talk, and ultimatums. If we do at your behest, going by past experience, you would or you would get somebody on your behalf to file charges on the quantum and process of raises claiming improper influence or retaliation depending on how the individual views his/her raise.

Respondent posted this letter at the facility and it remained posted for about 3 months. As stated above, bargaining did not begin until after the Board's certification issued in February 1993.

John Anderson has been employed by Respondent since 1982. He began as an EMT Intermediate and in about 1986 he became a paramedic. He testified that prior to 1986, Respondent granted wage increases to employees twice a year, in April and October. Beginning in about 1986 wage increases were given every year, solely in October, except for increases warranted by change in job classifications, such as Anderson's promotion to paramedic in about 1986. From about 1986 through 1991, in October of each year Respondent gave cost-of-living increases of 4 percent, plus up to an additional 3-percent increase dependent upon the employee's evaluation. However, there was a ''cap,'' and if the employee's salary had reached that amount, he would receive no more even if his evaluation recommended the full additional 3 percent. Anderson's pay stubs for 1990 establish that his hourly rate went from $14 an hour for the week ending September 29, 1990, to $14.56 an hour for the week ending October 6, 1990, with a pay date of October 11, 1990. He testified that he did not get the full 7 percent because he reached the ''cap.'' His pay stubs for 1991 establish that his hourly rate for the payroll period ending October 26, 1991, was increased to $15 an hour again, apparently, because he reached the ''cap.'' The pay date for this workweek was October 31, 1991. He testified that as far as he knows all of Respondent's employees received wage increases at these times in 1990 and 1991. He received no wage increases anytime in 1992 and was never told anything by Respondent as to why no increases were given.

Singh testified on behalf of Respondent. He has been employed by Respondent since November 1989. He testified:

> [T]he raises were given at practically different times of the year. There has been no consistency as to the timeliness or the time at which raises were given. The only period of consistency that I find is . . . October of '90 and October of '91, for which, of course, there were reasons why it was done.

He testified that the ''consistency'' was caused by the fact that after Professional purchased Respondent in 1988, Respondent's operation was moved to Professional's location (the facility) and Respondent had to ''ensure that . . . there is equity, there is fair play between the raises of employees for the two companies.'' He learned that the wages of Professional's employees (represented by the Union) were higher than the wages of Respondent's employees. The final year of the contract between Professional and the Union 1990 was and it provided for a 6-percent wage increase. A new contract was signed in 1991 and provided for a 7-percent increase in June 1991, a 10-percent increase in June and no increase in 1993. In 1991, Respondent determined that it would establish wage increases for Respondent's employees that would be fair as compared to Professional's employees and strive to have equality between the companies by 1994. In this regard, Respondent determined that it would give Respondent's employees a 4-percent cost-of-living increase with an additional increase of up to 3 percent dependent upon an evaluation of their work.

Respondent introduced into the record the payroll records of Anderson and Ernest Handau. Handau's record establishes the following wage increases:

> June 1, 1986 to $6.51 an hour.
> February 9, 1987 to $9.50 an hour.[2]
> February 14, 1988 to $10.79 an hour.
> August 14, 1988 to $11.79 an hour.
> December 4, 1988 to $12.00 an hour.
> October 1, 1989 to $12.90 an hour.
> April 24, 1990 to $13.50 an hour.
> October 1, 1990 to $14.41 an hour.

Handau has been employed as a casual since about that time. Anderson's payroll records state that he received a $1 raise to $12.99 an hour in August 1988. Unfortunately, they establish nothing else other than that he received an excellent evaluation in July 1988.

No raise was given to Respondent's unit employees in October. Singh testified that after consulting with labor counsel, Dave Anderson, Respondent decided not to give these raises:

> We were agonizing over this question. It was a very difficult issue for us . . . . Our problem was that Dave Anderson said, hey, given the history of whatever has been happening, you're damned if you do, you're

[2] Apparently, the large amount of this increase was due to the fact that his classification was changed from EMT Intermediate to paramedic.

> damned if you don't because you give the raises, this union has a history of fighting charges over everything that happens. In the last two years, maybe 10, 15 charges have been filed and each one of them has been with drawn . . . the Board has refused to issue a complaint except this is the only charge where the complaint has been issued. No other charge—for no other charge the complaint has been issued.
>
> There is a history of filing charges and grievances by this union. So Dave Anderson's advice was this, maybe it's a safer course not to give the raises. Because you give the raises, they'll come back and they'll get you and why did you give this much, why didn't you give this much, you gave so much to so and so and you gave so little to so and so. And they will get you on—in a number of charges which you will in no way be able to explain. That was our problem.
>
> We had no difficulty—in giving raises, in fact, we started the process of evaluation . . . . We started doing the evaluations, but we really could not go ahead with it. We were prepared to give the raises, but we could not go ahead with it because we had this particular problem. That if you do it we will be caught. If you don't do it, perhaps you'll be caught.
>
> The other possibility was we would have done it and we would have been involved for another 15 charges, not one in this case, but maybe 15 charges; we don't know.
>
> And so that is the reason, that was the compulsion why the company's management decided that maybe let us have on the safer side. It was not with an intent to deny the raises. It wasn't at all.

IV. ANALYSIS

Respondent did not give wage increases to its unit employees in about October while its objections to the Board election were pending. It is clear that increases were given to these employees, at least, in October 1990 and October 1991. The issues that have to be decided are how long Respondent had been granting these wage increases and why it did not give the increases in October.

Anderson testified in a brief and concise fashion, supported by his paystubs, to establish that wage increases were given by Respondent in October of each year, beginning in about 1986. Singh's testimony, on the other hand, was vague, conclusionary, and unending, with little substantive support. I have no difficulty crediting Anderson's testimony. Further, there is additional evidence supporting Anderson's testimony. Respondent's August 24, 1990 memorandum stated that effective October 1, 1990, all of Respondent's employees would receive wage increases of between 4 and 7 percent. In addition, Singh's letter to Fackelmann dated November 5, which remained posted at the facility for about 3 months, states: ''Yes, L&M employees have been receiving merit raises in varying amounts based on evaluation of their performance by Management, generally around fall.'' The only evidence Respondent produced to refute the General Counsel's allegation of a pattern of wage increases in about October was Handau's personnel record to establish that prior to 1989 he received wage increases at other times, as well, and that in April 1990 (as well as October 1990) he received a wage increase, and Anderson's payroll records to establish that he received a wage increase in August 1988. Respondent employs approximately 80 employees in the bargaining unit obviously, if evidence existed that the pattern alleged by the General Counsel did not exist, Respondent would have produced this evidence. That Respondent produced only Handau's payroll records and the 1988 payroll records for Anderson leads me to the inescapable conclusion that there is nothing else to support their argument. I therefor find that, at least since about 1986, Respondent has granted yearly wage increases to its unit employees in October of each year.

In *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), the Board stated:

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes . . . . It is well established . . . that, whether unlawfully motivated or not, an employer violates Section 8(a)(5) and (1) where it makes changes in terms and conditions of employment during the pendency of objections to an election which eventually results in the certification of the union.

In *Toyota of Berkeley*, 306 NLRB 893 (1992), the Board stated: ''the employer who wishes to make unilateral changes runs the risk that the union will be deemed the winner of the election and the changes will be deemed unlawful. Hence, under *Mike O'Connor*, the changes here were unlawful.''

In the instant matter, Respondent changed its pattern of granting wage increases to its unit employees by not granting any increases in October without negotiating with the Union about this subject. No economic defense is raised to this change. The Respondent's objections were eventually overruled and the Union was certified. This change therefor violates Section 8(a)(1) and (5) of the Act. *Venture Packaging, Inc*., 294 NLRB 544 (1989).

It is further alleged that, by not granting the regular wage increases in October, Respondent also violated Section 8(a)(1) and (3) of the Act. *Peabody Coal Co*., 265 NLRB 93, 99 (1982), states:

> [A]n employer violates Section 8(a)(3) and (1) when it varies from its established practices of granting wage increases and other benefit improvements because of the pendency of a representation campaign or because a labor organization has been elected by its employees to represent them for collective bargaining purposes.

In *Parma Industries*, 292 NLRB 90, 91 (1988), the Board stated:

> The good-faith postponement of benefit increases otherwise due is lawful when the employer is careful to explain that its purpose is to avoid the appearance of interference with employees' organizational efforts. The

> employer, however, may not seek to shift to the union the onus for the postponement of such increases.

In the instant matter, Singh testified that Respondent didn't grant the wage increase under the theory: ''Damned if you do, damned if you don't,'' in that if it granted the increase the Union would have filed charges about the wage increase. He testified that in the last 2 years the Union has filed 10 or 15 charges and the instant matter is the only one in which a complaint has issued. These arguments are too transparent to require much comment. Firstly, it seems highly unlikely that the Union would have filed a charge if Respondent had granted the raise in October because Fackelmann, by letter of October 13 and in person on about October 28, asked Singh to grant the employees their regular expected raises. In addition, as to the Union's alleged propensity to file worthless unfair labor practice charges, the decisions of Judge Cohn and Judge Green establish that the Union has good reason for filing many of its charges, and further establishes union animus on the part of Respondent. Further evidence of Respondent's union animus is established by Singh's November 5 letter to Facklemann, which was posted at the facility, and put the blame on the Union, and its alleged ''serious irregularities'' at the election, for the lack of the October wage increase. I therefor have no difficulty discrediting Singh's testimony about the reason Respondent did not grant the usual wage increase in October. Based upon the failure of Respondent to establish a valid reason for its failure to pay the regular wage increase in October, together with its union animus demonstrated in the prior Board decisions, and its posted letter of November 5, 1992, which blames the Union for the lack of a wage increase, I find that it was in retaliation for the employees' vote in August at the Board-conducted election. It therefor violates Section 8(a)(1) and (3) of the Act, as well as Section 8(a)(1) and (5) as previously found.

CONCLUSIONS OF LAW

1. The Respondent, L & M Ambulance Corporation, is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time emergency medical technicians, including EMT-A's, EMT-Intermediates, EMT-Paramedics, and all complaint writers and dispatchers employed by the Respondent at or out of its facility; but excluding all other employees, all casual employees, all office clerical employees, and all guards, professional employees, and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1), (3), and (5) of the Act by failing to grant to its employees in this unit an annual wage increase on about October 1, 1992.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent restore the employees to the position in which they would have been absent the violation i.e., by reimbursing them for the lost wage increase of October 1, 1992. This is difficult to determine, because, if Respondent had granted the increases, as it was legally obligated to do, they would have been in the range of 4 to 7 percent depending upon the evaluation that the employee received. The Board's long established policy is that it is the wrongdoer, rather than the innocent victim, who should bear the hardships of the unlawful action. *Mashkin Freight Lines*, 272 NLRB 427 (1984). I shall therefor recommend that Respondent be ordered to make all the unit employees whole by giving them a wage increase of 7 percent, retroactive to October 1, 1992, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Additionally, because of Respondent's past violations, and the obvious nature of this violation, a broad cease-and-desist order is warranted here. *Fire Fighters*, 304 NLRB 401 (1991).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, L & M Ambulance Corporation, West Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding wage increases, previously given, in retaliation for its employees, activity in voting to be represented by the Union.

(b) Unilaterally discontinuing its prior policy of granting yearly wage increases to its unit employees in October without first bargaining collectively with the Union, the collective-bargaining representative of its employees in the abovementioned appropriate unit.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union with regard to the amount of wage increase to be given to the employees, effective October 1, 1992, and if an understanding is reached embody that understanding in a signed agreement.

(b) Retroactively put into effect a 7-percent wage increase for all unit employees employed on October 1, 1992, and pay to those employees the amount of back wages accrued since October 1, 1992, all with interest on the increases, and continue to grant annual 7-percent wage increases to these employees on October 1 of each year until it bargains in good

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

faith with the Union, or the Union refuses to bargain in good faith over cessation of such increases.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due to the unit employees here under the terms of this Order.

(d) Post at all of its facilities in the Hartford, Connecticut area, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''